No. 12437

IN THE

United States
Court of Appeals

FOR THE NINTH CIRCUIT

J. A. ALLEN,
Appellee.

UNITED STATES OF AMERICA,
Appellant,

} No. 12437

On Appeal from the District Court of the United States, for the Eastern District of Washington

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BRIEF FOR THE APPELLEE

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ADDITIONAL STATEMENT OF THE CASE

In order that this court may have a brief and concise statement of this case it is necessary to restate the essential facts upon which the jury found the appellant Allen guilty. These are relatively simple and certainly not intricate.

I. *Supplemental Statement of Case.*

The appellant was charged jointly with Keane and Grismer of violating the Mail Fraud Statute and the

Securities Act of 1933, and with conspiring to violate both of these statutes. He was convicted on the conspiracy count.

A. *Pleas*

All the defendants first pleaded not guilty (R. 23-24). Then defendant Keane, upon motion of his counsel, persuaded the court (Judge Driver) to accept a plea of nolo contendere from him as to all counts and the plea of not guilty was withdrawn (R. 27-48). Later Grismer also persuaded the court to accept a plea of nolo contendere as to the conspiracy count (R. 49-54). The next day appellant Allen also withdrew his plea of guilty and entered a plea of nolo contendere as to all counts, except count VI, which was dismissed as to both Keane and Allen (R. 55-57).

The court at that time made it very plain to all the defendants that the court could impose any punishment up to the maximum upon a plea of nolo contendere (R. 45-46). Allen's plea of nolo contendere stood from January 13, 1949 to March 21, 1949, during which time the probation officer was making pre-sentence investigations at the direction of the court in order that the court would be advised as to the proper sentence to give each of the defendants. On March 21, 1949, the defendants appeared for sentence. On that date Mr. Emigh, one of appellant's counsel, asked the court before sentence was pronounced whether or not a jail or penitentiary sentence could be expected (R. 59-61). The court again stated that a penitentiary sentence could be imposed and cited the case of *Hudson v. United States*, 272 U. S. 451 (R. 61-64). Allen thereupon obtained the court's permission to withdraw his plea of nolo contendere and enter a plea of not guilty as to all counts. The order dismissing count VI as to

defendant Allen was set aside (R. 65). Judge Driver then disqualified himself from trying appellant's case (R. 64-69).

B. *Conspiracy Count*

The conspiracy count, count VII of the indictment, charged that prior to June 1, 1945, and continuing until May 6, 1948, the date of the indictment, Allen, Keane and Grismer conspired to violate the Securities Act and the Mail Fraud Statute by using and intending to use the mails of the United States for the purpose of executing a scheme to defraud investors in stock of the Lucky Friday Extension Mining Company and the Pilot Silver-Lead Mines, Inc., (referred to as "Extension" and "Pilot" respectively) and to obtain money and property by means of false and fraudulent pretenses, representations and promises, as follows:

1. That the defendants would and did promote and organize Extension and Pilot Companies and did conceal the fact that Allen was a promoter of these corporations or was to receive any portion of the stock.

2. That the defendants concealed the amount of stock issued to them and did misrepresent to the investors the amount of stock issued for attorney's fees.

3. That the defendants did represent to the investors that the proceeds of the sale of Extension and Pilot stock would be used for the development of these properties.

4. That the defendants would conceal from the stockholders information concerning the receipt and expenditure of moneys of these corporations.

5. That the defendants did not disclose the diversion from these corporations of a large amount of the corporate moneys for their own use and benefit.

6. That the defendants represented that they would spend the money or the entire net proceeds of the public financing by the sale of stock in these corporations on the mining properties of Extension and Pilot, whereas they spent only a small portion of the funds in the development of Extension and Pilot properties in order to create an appearance of mining activity and then disposed of their promotion stock by selling it on the market to the investing public without disclosing to the public that they had appropriated for their own use a large portion of the funds of the companies.

7. In pursuance of said conspiracy it was alleged that the defendants performed a number of overt acts, many of them being in the Eastern District of Washington.

These charges arose from the sale of common stock of Lucky Friday Extension Mining Company offered to the public in July 1945, and in January 1946, and from the sale of the common stock of Pilot Silver-Lead Mines, Inc., offered to the public in May 1946. These offerings of stock were sold through underwriters on the representation that the proceeds therefrom were to be used for the development of mining properties held by these companies. Instead, Allen and Keane, the promoters of these companies, fraudulently embezzled and diverted the largest portion of such proceeds to their own use and benefit, depleting the bank accounts of these companies whereby development of the companies' properties was rendered financially impossible. After their diversions, which assured the failure of these companies, these promoters unloaded large quantities of their personally-owned promotion stock on the investing public.

C. Diversions from Extension Funds

There is no dispute as to certain essential facts established by both written and oral evidence and not contested by appellant. Extension's first offering, commencing in July 1945, resulted in the sale of one million shares of its stock to the investing public at 12½c a share, netting the company 10c per share or $100,000. Almost immediately, even while this offering was still being made to the public and money coming in from the underwriters[1], the diversion of Extension's funds began.[2] A second offering of three hundred thousand shares of Extension stock was made in January 1946, at 32½c per share, netting the company $78,000 after paying underwriting commissions. Thus, Extension received $178,000 from these two offerings. Of this amount, $113,000 was diverted to Montana Leasing Company, or Lexington Silver-Lead Mines, Inc., its successor, between July 28, 1945, and May 17, 1946. Montana Leasing and Lexington Silver were wholly owned and controlled by the defendants, Allen and Keane, and both Allen and Keane spent money which came to these companies out of the Extension funds for their personal expenditures.[3] On August 7, 1945, the sum of $10,000 of Extension funds was di-

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1 See Exs. 1, 2 and 3. (Numbered exhibits were introduced by appellee; lettered exhibits by appellant.) The first Extension money from underwriters was a check dated July 19, 1945. Money was received from Extension underwriters in July, August and September of 1945 and in January and February of 1946.

2 $1,500 was diverted from Extension to Montana Leasing on July 26, 1945; on July 28, 1945, $3,500 was diverted; $15,000 in August; $12,500 in September; $8,500 in October; $6,000 in November 1945, etc. See Exs. 6a, 108, 109 and 118.

3 See Ex. 120 Allen admitted that a number of his Montana Leasing and Lexington Silver checks were drawn for personal living expenses (R. 1115) and specifically referred to a check in payment of his boy at the race track (R. 1160).

verted to Delaware Mines Corporation, a corporation controlled by Allen (Ex. 6a). In a later portion of this brief Allen's connection with this particular diversion to Delaware is further detailed.

D. *Diversion from Pilot Funds*

In the latter part of May 1946, Pilot Silver-Lead Mines, Inc., offered and sold to the investing public one million shares of its common stock at 12½c per share, netting the company $100,000 after payment of $25,000 in underwriting commissions.[1] The Pilot money was also diverted from its bank account as fast as it came in from the underwriters and while sales were still being made to the investing public.[2] By June 1, 1946, only a few days after the commencement of the offering, $42,000 had been taken by Allen and Keane and by September 12, 1946, there was an overdraft in Pilot's bank account caused by the diversions of over $90,000 out of the $100,000 received from the underwriters. These diversions from Pilot were as follows:

$61,300 to Lexington Silver-Lead Mines, Inc., successor to Montana Leasing Company, between May 31, 1946 and August 23, 1946.

$15,000 to Coeur d'Alene Consolidated Silver-Lead Mines, Inc. on May 22, 1946.

$10,000 to Independence Lead Mines, Inc. on June 25, 1946.

$3,000 to Extension on July 8, 1946.

$1,200 to War Eagle Silver-Lead Mines, Inc. (also called War Eagle Mining Co.) on June 28 and July 31, 1946.

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1 Exs. 10, 11, 12 and 13, checks from underwriters to Pilot.

2 Exs. 112 and 113.

Alien and Keane were jointly interested in all of the companies to which these diversions were made, with the exception of Independence, which was controlled by Keane. However, Independece had previously advanced large sums of money for joint enterprises of Allen and Keane (Ex. L).

Of the $123,000 diverted from Extension only $28,250 was ever repaid. Of the $90,500 diverted from Pilot only $15,165 was ever repaid. Thus, of the total diversions from Pilot and Extension, amounting to $213,500, there still remained $170,085 which was not put back into these companies, most of this money having been dissipated by Allen and Keane for their personal expeditures (Keane R. 663, 664, Ex. 120).

The Extension and Pilot stock was sold to the public on the express representation that the proceeds therefrom were to be used for the development of the mining properties owned respectively by these companies.[1] The net result, however, was that out of the $178,000 received from the sale of Extension stock only about $80,000 was spent for company purposes, and out of the $100,000 received from the sale of Pilot stock less than $18,000 was spent on the mining property.[2]

During all of the time this stock was being sold the money was being wrongfully and fraudulently diverted, which fact of course was not made known to the stock purchasers. As a result of these wrongful diversions, both companies soon were without funds, and mining operations ceased (Grismer R. 407).

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1 See Ex. 68, Pilot prospectus, and Ex. 69, Extension prospectus. Also Exs. 81 and 89, and Ex. "A", documents filed with Seattle Regional Office of the Securities and Exchange Commission and with the License Department of the State of Washington.

2 See Exs. 108 and 112; also Exs. T and U, audit reports on Extension and Pilot, respectively. Grismer R. 392 and 407, Horning R. 264.

E. *Allen's Connection with Diversions*

Since the foregoing facts are not and can not be disputed, the only issue is whether any substantial evidence connected defendant Allen with the conspiracy to divert these funds. The jury found by its verdict that such evidence existed, and it is our purpose to briefly refer to some of the evidence which supports the jury's verdict.

(a) *The Diversion of $10,000 of Extension Funds to Delaware*

On August 7, 1945, while the first offering of Extension stock was being sold to the public, Allen obtained two blank Extension checks signed by Irene Vermillio, Keane's secretary. These were Extension checks No. 8 (Ex. 6a) and No. 9 (Ex. 6b). Keane officed in the Gyde Building in Wallace, Idaho, and Allen, when in Wallace, used Donald Callahan's office across the hall in the same building. Allen had Beatrice McLean French, Callahan's secretary, fill in these blank checks. French performed secretarial and stenographic services for Allen from time to time when he was in Wallace (French R. 338).

Extension check No. 8 (Ex. 6a) was filled in for $10,000, dated August 7, 1945, and made payable to Delaware Mines Corporation, which company was controlled by Allen (Allen R. 1028, 1029). Allen then had French deposit this $10,000 check to Delaware's account, and at the same time had her prepare three Delaware checks[1] distributing this $10,000 as follows: $3,000 to Montana Leasing Company; $6,000 to Callahan Consolidated Mines, Inc.[2]; and $1,000 to W. H.

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1 French kept blank Delaware checks signed by Allen and Keane for the purpose of preparing checks for them from time to time (French R. 329).

2 Allen had been vice-president of Callahan Consolidated (Allen R. 1023).

Hansen, a Wallace attorney. Allen then had French deposit the $3,000 check in the Montana Leasing bank account, and she also deposited the $6,000 check in Callahan Consolidated's account.

Extension blank check No. 9 (Ex. 6b) was at a later time filled in by French, at Allen's direction, for $5,000, dated August 28, 1945, made payable to Montana Leasing Company, and deposited in that company's bank account on August 28, 1945. The significance of this diversion to Montana Leasing will be discussed later.

The foregoing facts were established by the following evidence, which was not controverted by appellant:

1. Testimony of Irene Vermillion that at Allen's request she signed and delivered the blank Extension checks No. 8 and No. 9 to Allen in the Callahan office (R. 163-171).

2. Testimony of Beatrice McLean French regarding these related transactions (R. 328-339).

3. Notation "To J. A. A." made by Vermillion on Extension check stubs No. 8 and No. 9 (Ex. 5a).

4. Two Montana Leasing Company checks (Exs. 8-c-1 and 8-c-2) dated August 7, 1945, and bearing Allen's signature, were also drawn by French for Allen's personal expenditures on August 7, 1945, in the Callahan office, showing Allen's presence in that office on that date (French R. 339).

5. The Delaware deposit slip (Ex. 34) for banking Extension check No. 8, the Montana Leasing deposit slip (Ex. 35) for banking the $3,000 check from Delaware, and the Callahan deposit slip (Ex. 44) for banking the $6,000 Delaware check, all were prepared on August 7, 1945, by French, who also on the same day credited the $6,000 Delaware payment to Callahan Consolidated to repay funds (French R.

333) which Allen had previously borrowed from Callahan Consolidated on behalf of Delaware (Keane R. 645-647).

6. The Extension checks No. 8 and No. 9 (Ex. 6a and 6b), the three Delaware checks (Ex. 41a and 41b), and the Montana Leasing checks signed by Allen (8-c-1 and 8-c-2) were all typed on the Underwood typewriter used by French in Callahan's office and were stamped with the check protector in that office (French R. 337).

7. The records of the Samuels Hotel in Wallace, Idaho (Exs. 77 and 78) disclose that Allen registered at the hotel on August 6, 1945, checking out August 10, 1945, and that Allen again registered on August 27, 1945, checking out August 30, 1945 (Comini R. 514-522), showing that Allen was in Wallace on both August 7 and August 28, 1945, the days on which Extension checks Nos. 8 and 9 were deposited in the Delaware and Montana Leasing accounts, respectively.

8. Keane was not in Wallace during business hours on August 7, 1945, but had left early that day and was gone for several days on a fishing trip. (Vermillion R. 202, Keane R. 648, Horning R. 264-265). This confirmed his denial of any knowledge about the drafting of Extension checks Nos. 8 and 9 (Keane R. 643).

It is submitted that this uncontroverted evidence links Allen to this fraudulent diversion of Extension funds to Delaware and Montana Leasing just as conclusively as though his signature appeared on those checks which he obtained from Vermillion on August 7, 1945. It should be noted that Allen did not deny any of this significant and damaging evidence, and

has in fact very carefully avoided mention of it in his brief.

(b) *Diversion to the Montana Leasing Company and its Successor, Lexington Silver-Lead Mines, Inc.*

Reference has already been made to Allen's direct diversion of $5,000 of Extension's money to Montana Leasing Company's account by means of the blank check which he obtained from Vermillion, had French prepare, and which was deposited in the Montana Leasing account on August 28, 1945. In addition to this check, the evidence disclosed that Allen was connected with all of the diversions of money from both the Extension and Pilot accounts to Montana Leasing and its successor, Lexington Silver-Lead Mines, Inc.

Numerous Extension checks (Ex. 6) and Pilot checks (Ex. 15) were made out directly to Montana Leasing Company or Lexington Silver-Lead Mines, Inc.[1] Irene Vermillion testified (R. 157, 187) that she signed these checks at the direction of both Keane and Allen, (R. 225, 226, 233, 234). Keane testified that these checks were written by Vermillion under his or Allen's directions and that he and Allen regarded these diversions as loans to Montana Leasing or Lexington Silver-Lead (Keane R. 615, 657). There was, of course, no corporate authorization by either Extension or Pilot for the taking of this money (Keane R. 658). Keane stated that Vermillin had general instructions from Allen and Keane to take funds from whatever source available to cover outstanding checks arising out of their Montana mining operations, which involved the issuance of substantial checks to meet

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[1] See Exs. 108 and 109 for list and summary of Extension checks, and Exs. 112 and 113 for list and summary of Pilot checks. Also see Exs. 118 and 119 showing deposits to Montana Leasing and Lexington Silver.

payrolls (R. 617) as well as the issuance of checks for their personal expenditures, (Allen R. 1115 and see Ex. 120). Keane further testified that the bank would notify his office of overdrafts in the Montana Leasing and Lexington Silver-Lead accounts, and arrangements would then be made to immediately cover such overdrafts by the transfer of Extension or Pilot funds (R. 619).

That Keane's testimony is supported in fact is clear from an analysis of Exhibits 118 and 119, which are summaries showing deposits in the Montana Leasing and Lexington Silver accounts and the bank balances in those accounts on the specific dates on which deposits of Extension and Pilot checks were made to those accounts. There were twenty such deposits made with checks drawn on Extension or Pilot funds when there were overdrafts in the Montana Leasing bank account, and seventeen deposits from Extension and Pilot funds when the Montana Leasing or Lexington Silver bank account showed a balance of less than $1,000.

For example, when the first Extension money was deposited in the Montana Leasing account on July 26, 1945, it covered an overdraft of $1,322.70, and the August 28, 1945 check for $5,000, which Allen prepared, covered an overdraft of $458.99 in the Montana Leasing account (Exhibits 118 and 119). In this connection it is interesting to note that, as shown by Exhibit 120, which is a schedule of checks signed by Allen on the Montana Leasing and Lexington Silver bank account from July 1945 through August 1946, Allen drew a Montana Leasing Company check for $350 to Helen A. Allen, his wife, on August 28, 1945, the same day the $5,000 he diverted from Extension went into the

Montana Leasing account to cover an overdraft. On the next day, Allen drew a check payable to cash for $600. A comparison of these exhibits reveals many other instances where deposits of Extension and Pilot funds were made to cover overdrafts immediately preceding or during a time when Allen was writing substantial checks on the Montana Leasing-Lexington Silver account.[1]

During this period, when a total of $174,300 of Extension and Pilot funds were diverted to the Montana Leasing-Lexington Silver account, both Allen and Keane were drawing substantial checks against that account and spending some of the money for their living expenses, drinking and gambling (Keane R. 662-664). From July 1945 through August 1946 when this account was largely dependent on the funds embezzled from Extension and Pilot, Allen wrote over 260 checks, totaling $49,327.91 (Ex. 120). It is submitted that Allen's connection with these diversions to Montana Leasing and Lexington Silver was well and amply established by the evidence.

(c) *Diversion of $15,000 of Pilot Funds to Coeur d'Alene Consolidated Silver-Lead Mines, Inc.*

The first check received from the sale of Pilot stock by E. J. Gibson & Co. of Spokane, one of the underwriters, was in the sum of $40,000 dated May 23, 1946 (Ex. 31A). Keane testified (R. 626-627) that Allen came to Wallace from Spokane, walked up to Keane

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[1] See in Ex. 120 eleven checks drawn by Allen, September 29 through October 4, 1945, all payable to "Cash", totaling $1,350, preceding an overdraft of $1,048.50 on October 4, which was covered by a deposit of $2,500 of Extension funds on October 5; and an overdraft of $146.79 on October 5, which was covered by a deposit of $1,000 of Extension money on October 6, as shown on Exhibit 119.

at the Metals Bar, handed him this $40,000 check, and stated:

"How's that for bringing in the money, Bucko?"

This $40,000 with another Gibson & Co. check for $10,000, made a total of $50,000 in the hands of these promoters. This $10,000 check (Ex. 31) was payable to James Gyde and covered the sale of some promotion stock issued in Gyde's name but which by prearrangement actually belonged to Keane and Allen.

Allen then informed Keane that he wanted $25,000 out of this money for the Coeur d'Alene Mines Corporation contract (Keane R. 627). A contract had been entered into by Coeur d'Alene Consolidated Silver-Lead Mines, Inc. (jointly controlled by Allen and Keane) with Coeur d'Alene Mines, requiring the payment of $25,000 for work which Coeur d'Alene Mines was to do in connection with the development of the Coeur d'Alene Consolidated property (Ex. 39). Allen had signed this contract for Coeur d'Alene Consolidated as president, and Grismer had signed as secretary. Keane first deposited $25,000 to the credit of Coeur d'Alene Consolidated and took the duplicate of the deposit slip back to the Metals Bar. Allen, however, advised him that he wanted a cashier's check, (Keane R. 628) and Keane then returned to the bank and obtained a cashier's check, made payable to Coeur d'Alene Mines, which check was escrowed with the agreement. (Ex. 39). The remainder of this $50,000[1], made up by the two Gibson checks, was disposed of as follows: $20,000 was deposited to the credit of Pilot, and $5,000 paid to Keane in repayment of a previous

[1] See testimony of Leo G. Kraemer, Pro Manager of Idaho First National Bank of Wallace (R. 313-316), for an explanation of how this money was handled at the bank.

advance, referred to in the Pilot prospectus (Ex. 68). Thus, out of the first $40,000 received from Pilot stock sales, $15,000 was diverted for use on behalf of Coeur d'Alene Consolidated at Allen's specific direction (Keane R. 629).

(d) *Diversion of Pilot Funds to War Eagle Silver-Lead Mines, Inc.*

Two Pilot checks dated June 28, 1946 and July 31, 1946, totaling $1200 were issued to War Eagle Silver Lead Mines, Inc. (Ex. 15a and 15b). This company was owned by Allen, Keane and one Ben Porter, each owning a ⅓ interest (Keane R. 655). Porter had told Allen and Keane that he would need about $10,000 during the summer of 1946 to do some work at the War Eagle Mining property, and Keane and Allen agreed that they probably would be able to help out (Keane R. 655). About June 28, 1946 Vermillion called Allen and told him that the bank had called Keane's office about an overdraft on the War Eagle account. Allen then instructed Vermillion to cover this overdraft (Vermillion R. 199). The two Pilot checks totaling $1,200 were prepared by Vermillion pursuant to this instruction given her by Allen, and they were deposited by her in the War Eagle account (Vermillion R. 200).

(e) *Diversion of Pilot Money to Independence*

On June 25, 1946, after the commencement of the offering of the Pilot stock, $10,000 of Pilot's money was diverted by a check to Independence Lead Mines, Inc. Independence was the only company to which funds were diverted in which Allen did not exercise at least joint control with Keane. However, even in the diversion to Independence, Allen was closely con-

nected. Keane testified that he discussed with Allen the diversion of this $10,000 of Pilot's funds to Independence, and that Allen agreed to it. (Keane R. 656-657). Previously, as shown by defendants' Exhibit L, considerable sums of money had been advanced to Montana Leasing by Independence (Keane R. 690).

The schedules attached as a part of Exhibit L also show that a large portion of this money was furnished by means of checks made payable to the order of James A. Allen which were deposited in the Montana Leasing account. This was admitted by Allen (Allen R. 1123 and 1124). Thus Allen's acquiescence in Keane's plan to divert Pilot money to Independence is understandable, since he and Keane had previously financed their joint Montana operation out of Independence funds.

All of this evidence connecting Allen with the misappropriation and diversion of Pilot and Extension funds to Delaware, Montana Leasing-Lexington Silver, Coeur d'Alene Consolidated, War Eagle and Independence, clearly justified the jury's verdict that Allen was one of the conspirators.

F. *Sale of Promotion Stock by Allen*

(a) *Extension promotion stock*[1]

Keane and Allen decided on the amount of Extension promotion stock to be issued, and that out of the 500,000 shares purportedly issued for attorney's fees to Elmer Johnston and Keane, 425,000 shares were to belong to Allen and Keane (Keane R. 614). Allen made the arrangements with Johnston under which 200,000 shares were issued to Johnston, out of which Johnston, however, retained only 75,000 shares, re-

[1] See Ex. 106 for schedule of original issue of Extension shares.

turning 125,000 to Keane for Allen and Keane (Johnston R. 546, and Keane 624, 625). 60,000 shares of the 425,000 shares of promotion stock were sold through brokers' accounts in the name of J. A. Allen and Helen Jorgenson (Allen's wife's maiden name (R. 501)) for a total of $13,410.20 in November and December of 1945 (Ex. 114, Greene R. 815-825). This money went to Allen (Exs. 75, 104, 105; Greene R. 816).[1] 200,000 shares were sold by Keane and Allen to J. T. Halin in October 1945, Allen delivering the stock. Halin paid $20,000 for this stock, $13,000 in a check to Keane and $7,000 in cash to Allen (Halin R. 794-801).[2] An additional 75,000 shares were sold to Halin by Allen in January 1946 at 24½ cents per share or $18,375.00 (Halin R. 795). This accounts for the sale of 335,000 shares of Extension stock out of 425,000 shares represented to be issued for attorney fees. Allen and Keane realized $51,785.20 from the sale of this stock.[3]

Out of the 1,229,700 shares of Extension stock issued to Grismer for mining claims, Grismer actually was to get only 100,000 shares, the balance belonging to Allen and Keane subject to certain commitments made to others (Keane R. 614). As shown in Ex. 116, there were 455,000 of these shares sold for $57,217.36 through various brokerage accounts in the names of Helen Allen, Helen Jorgenson (Allen's wife's maiden

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1 J. A. Hogle and Co. check (Ex. 105) for $6,872.95, dated December 3, 1945, and payable to J. A. Allen, was deposited in Montana Leasing account on December 5, 1945. (See page 6 of Ex. 118 and also Ex. 9a, Montana Leasing deposit slips.)

2 See Denney's testimony R. 870-872 and Ex. 96 tracing this stock.

3 By October 1945, Keane and Allen had already diverted $41,000 of Extension money to Delaware and Montana Leasing (Exs. 108, 119, and 6a). By January 1946, when both the promotion stock and the second corporate offering of stock sold at premium prices, nearly $60,000 had been taken by Keane and Allen from the first $100,000 received from Extension underwriters.

name), B. A. McLean and J. A. Allen. Ex. 74 shows that 265,000 of these Extension shares were sold through Helen Allen's account at E. J. Gibson & Co., at prices ranging from 12 cents up to 31 cents a share, during the period from July 2, 1946, through December 28, 1946. The McLean account was also Allen's (Exs. 47 and 50a; Allen R. 1134-1135; French R. 344-349).

While the government in its case did not undertake the task of accounting for the disposition of all certificates issued out of this Extension promotion stock, the foregoing evidence connects Allen with the sale of 790,000 shares of Extension promotion stock for which $109,002.56 was received.[1]

All of this stock was sold by Allen after the series of fraudulent misappropriations from Extension by Allen and Keane had begun. It is reasonable to assume that the purchasers would not have bought this Extension promotion stock, or at least would not have paid premium prices for it, if they had known that the funds necessary for the development of the Extension properties had been and were being stolen.

(b) *Pilot promotion stock*[2]

Allen and Keane also made the arrangements as to the Pilot stock issued for services (Keane R. 621). Keane and Allen were to own 550,000 shares of the amount issued to Keane and also to own 400,000 shares out of the 900,000 shares issued to Grismer (Keane R. 622, 623). An agreement similar to that with Johnston in connection with Extension was made with James Gyde, a Wallace attorney, who was to retain only 25,000 shares out of the 150,000 shares purport-

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1 Allen admitted receiving substantial amounts from the sale of his Extension stock (Allen R. 1139).

2 See Ex. 110 for schedule of original issue of Pilot shares.

edly issued to him for legal services. Keane and Allen arranged that the balance of 125,000 shares be returned by Gyde to them (Keane R. 624; Gyde 279). Out of these shares 120,000 shares were sold immediately to E. J. Gibson & Co., netting Keane and Allen $12,000 (Exs. 31 and 31a).[1] Keane and Allen used $10,000 of this amount to make up the amount of a payment on their Coeur d'Alene Consolidated Company's contract with Coeur d'Alene Mines, as previously mentioned in subdivision E(c) of this brief (Keane R. 626-630). As disclosed in plaintiff's Ex. 117, out of the Pilot promotion stock issued to Keane, Allen disposed of 275,000 of these promotion shares between December 1946 and January 15, 1948, for the sum of $9,062.

Thus Allen was connected with the sale of 395,000 shares of the Pilot promotion stock for the sum of $21,062.00. If the $109,002.56 obtained from the sale of Extension promotion stock is added to this amount the evidence showed Keane and Allen received from the sale of the Pilot promotion stock, it makes a total of $130,064.56 realized from the sale of the promotion stock issued by these two companies, of which $105,-064.56 was received directly by Allen.[2]

G. *Background of Allen's Part in the Promotion of Extension and Pilot*

Appellant has set out at considerable length his version of the facts leading up to the formation of Extension and Pilot and of the purported distant part he played in the affairs of these companies. This is the

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1 Actually these defendants sold 145,000 shares of this Pilot stock to Gibson but $2,500 was paid to Gyde for his 25,000 shares (Gyde R. 280).

2 Exs. 114, 116, 117, and Halin R. 794-801.

same story which appellant attempted to "sell" to the jury. Much of the evidence referred to by appellant in his brief regarding his relationship to numerous companies and his future plans for the deep development of that part of the Coeur d'Alene District near Mullan, Idaho, was entirely immaterial to the issues involved in appellant's trial. The trial court allowed appellant a wide latitude in putting his story before the jury. However, now that this case is being appealed, this collateral but irrelevant evidence should properly be disregarded. Because of appellant's repetition in his brief of many extraneous facts, a short statement of the real background leading up to the promotion of Extension and Pilot appears to be warranted.

Without going into all of the details, the essential facts are these: In the summer of 1943 Allen and Keane formed the Montana Leasing Company, a Montana corporation, for the purpose of operating some mining dumps located near the Lexington Mining Company's property at Neihart, Montana (Keane R. 609). Allen claimed the Montana Leasing Company continued to operate as a corporation, while Keane claimed the corporation was abandoned and that he and Allen were partners operating under the partnership name of Montana Leasing Company (Keane R. 610). This controversy is, of course, not material to the case. Their respective interests in and control of the enterprise were identical.

The first money for this Montana operation was taken by Keane from Independence, and a large portion of it consisted of checks issued by Independence payable to Allen, which Allen endorsed and deposited in the Montana Leasing account. (See Defendant's Exhibit L, attachments to Randall's audit of Indepen-

dence.) By the middle of 1945, however, the Independence funds having been nearly exhausted, the plan to organize and promote Extension was conceived by Allen and Keane for the purpose of supplying a new source of needed funds for their Montana Leasing operation (Keane R. 611). Allen advised Keane that he had acquired the Extension ground from John Seculic. It was understood that Allen could not appear or be known as a promoter of Extension, as he was under a court injunction (Ex. 121) which had the effect of precluding, for a three-year period, the use of exemptive Regulation A of the General Rules and Regulations, under the Securities Act of 1933, for any offering of securities made by a company of which Allen was a promoter (Keane R. 613, Johnston R. 514). For this reason, Grismer, who had worked for Allen for some time as manager of Callahan Consolidated, was made to appear as the principal promoter (Keane 612, 614).

After Extension was launched, Pilot was formed in December 1945 (Ex. 68, Ex. A), and Allen and Grismer obtained mining properties for Pilot (Grismer R. 396-397). Allen and Grismer made the arrangements and Allen closed the deals for the purchase of these properties (Keane R. 621, 622).

The evidence showed that Allen took an active part in the promotion of both Extension and Pilot. On behalf of these companies Allen, with Keane, employed and gave instructions to Vermillion (R. 151, 181, 190), French (R. 328) and Evans (R. 368-374). Allen told Grismer that he and Keane had decided to promote Extension, that they wanted Grismer to be president of the company but that they would take care of all of the details (Grismer R. 385) and that Keane would

handle the financial affairs (R. 390). Allen also directed Grismer to locate the Extension claims in Grismer's name (R. 386), and to endorse the promotion stock certificates issued to Grismer and turn them back (Grismer R. 388, 399). Allen sent Grismer to start negotiations with Herrick for the Cincinnati claims to go into Pilot (Grismer R. 396) and with Mrs. Phelan (R. 397) for the Phelan claims. Allen then made the final arrangements for the acquisition of these claims by Pilot (Grismer 396, Phelan 285-289, Herrick 296, Keane 621).

As early as May 1945 Allen and Keane talked to Johnston regarding the preparation of a public offering of Extension stock (Johnston R. 539). Allen conferred with Johnston regarding the material to be included in both the Extension and Pilot selling prospectuses (Johnston R. 543 and 567). On February 23, 1946, Allen paid for a part of the cost of taking aerial photographs, one of which was used in the Pilot prospectus, his check given in payment being initialed "PSL" for Pilot Silver-Lead (Ex. 8-i-1; Johnston R. 554-5). On May 14, 1946, Allen paid Johnston with a $1,000 check as part payment for Johnston's legal services in connection with the Pilot offering (Ex. 8-e-1, Johnston R. 556). In October 1945, Allen met Johnston at Wallace and persuaded Johnston, as an accommodation, to endorse a group of certificates (Ex. 50a) which had been issued in Johnston's name but which Johnston stated belonged to Keane (Johnston R. 559-560). These certificates were sold by Allen through J. A. Hogle & Co. on December 1, 1945 (Ex. 114). Allen's part in arranging with Johnston and later with Gyde for the "kickback" of promotion stock purportedly issued for legal services has already been explained

(Supra under sub-heading "F"; Johnston 546, Gyde 279).

In May and June 1945 when Extension was negotiating a contract with Lucky Friday Silver-Lead Mines Company (The Big Friday) and later when a supplemental agreement was made, Allen was the principal negotiator on behalf of Extension (Horning R. 260). Allen had previously advised Horning, a Wallace attorney representing the Big Friday, that Arthur Lakes would do the surveying on the Extension claims (Horning R. 274). Allen paid Lakes with several checks marked "Extension" or "Pilot" for work which Lakes had done at these properties (Lakes R. 957-967; Exs. 8-a-1, 8-g-1, 8-i-2, 8-m-1, and 122).

The foregoing array of evidence readily convinced the jury beyond a reasonable doubt that Allen played a major role in the organization and promotion of Extension and Pilot and that his contention that he first became interested in Extension in the fall of 1945 and after the first offering of stock had been sold (R. 1037) was false.

ARGUMENT

I. *As to the Sufficiency of the Evidence (Appellant's Point I)*

The answer to Appellant's argument that Allen did not conspire with Keane and Grismer is to say that there is abundant evidence to prove that he did conspire with Keane and Grismer. The testimony of Keane and Grismer, both accomplices, is to the effect that there was a conspiracy with Allen to obtain moneys and property by fraud. The testimony of the following witnesses corroborates beyond question that

of the accomplices to the effect that there was such a conspiracy:

Irene Vermillion, Record 148-209
Emeline A. Phelan, Record 285-286
W. H. Herrick, Record 295-298
Charles E. Horning, Record 258-263
Glynn D. Evans, Record 368-381
Elmer Johnston, Record 537-555
James E. Gyde, Record 279-283
Arthur Lakes, Record 957-971

Allen's participation as disclosed by the testimony of these witnesses and documentary evidence is pointed out clearly in the first part of this brief.

The case cited by the appellant of *Krulewitch v. United States,* 336 U. S. 440, is totally inapplicable to the situation here. The *Krulewitch* case is a case involving conspiracy where statements of co-conspirators, made after the termination of the conspiracy, were admitted in evidence over objection. Counsel for appellant cites at length certain extracts from the concurring opinion of Justice Jackson in the *Krulewitch* case which are certainly not the law as applied to conspiracy in federal courts. However, the cautions mentioned by Justice Jackson have been observed and followed by the Government in this case. Appellant's argument is in effect that Congress should repeal the conspiracy statute.

The testimony in this case shows beyond any doubt that during certain periods of time mentioned in the indictment there existed a closely-knit continuing concert of action involving Allen, Keane and Grismer in the organization of both Pilot and Extension, in the sale of stock to the public by means of prospectuses containing false and misleading representations, in the embezzlement and diversion of the funds of these cor-

porations, and in the dumping of personally-owned promotion stock on the market at enhanced prices after looting the corporations' treasuries. This is illustrated by the Court's summary at the time sentence was imposed.

> "Before imposing sentence, under all the circumstances I think I can well say that my own opinion is that Mr. Allen and Mr. Keane were about equal in their activities, Mr. Keane more active in one direction, Mr. Allen perhaps in another. Mr. Keane by virtue of his office and his name and his signature having been used, it seems to me was guilty to an absolute certainty whether he pleaded nolo contendere or not. Mr. Allen, being conscious of an injunction, put himself in a position where the evidence was not to an absolute certainty, but was beyond all reasonable doubt. Mr. Grismer was substantially a dupe, as I see it. Under all the evidence he was responsible for the law violation he engaged in, but he was a rather inconsequential participant." (R. 1290)

Appellant's complaint that the Government should have called Keane as its first witness rather than the sixteenth does not warrant a reply. The order of Government witnesses is still a matter to be determined by the prosecutor subject, of course, to the discretion of the trial court. We recall no objection by appellant during the trial regarding the order of the Government witnesses.

Nor was it necessary to produce a defrauded investor to prove the fraud as appellant now suggests. The evidence showed that the prospectuses which carried the false and misleading statements concerning the intended use of the proceeds from the stock sales, the names of the promoters, the amounts of promotion stock issued, the maintenance of proper books and

records, etc., were sent through the mails by the underwriters to thousands of customers in several different states. Certainly none of these investors were told that the stock for which they were sometimes paying premium prices was issued by persons who at the same time were diverting, embezzling and stealing the investors' money. There can be no doubt but that every investor was defrauded and the funds of both companies were all dissipated.

It is submitted that appellant's arguments as to the insufficiency of the evidence to connect him to the conspiracy fail in the face of the overwhelming evidence introduced by the Government and believed by the jury.

II. *As to the Termination of the Conspiracy (Appellant's Point II)*

The argument made by the appellant that any conspiracy ended on December 26, 1946, assumes that when two or three criminals, who are in a conspiracy, have an argument or a falling-out, that that of itself terminates the conspiracy. It is a recognized fact that often "thieves fall out" or have violent disagreements or quarrels among themselves but this in itself does not end the conspiracy unless definite and positive steps are taken indicating a withdrawal or termination. *Baldwin v. United States,* (CCA 9) 72 F. (2d) 810 at 814. c.d. 295 U. S. 761. It is also common knowledge that conspirators can enter a conspiracy or withdraw therefrom during its continuance and that the conspiracy nevertheless goes on. In this case the Government's theory throughout was that there was only one continuing conspiracy and that was to organize two companies, the Extension and the Pilot, to use the

mails in selling the stock of these companies by means of false prospectuses, to divert and use the majority of the funds of each of these companies for the purposes of the conspirators, and for them to then unload their promotion stock on the public. The evidence showed that Allen was still selling out the promotion stock originally issued to Grismer long after December 26, 1946 when both Allen and Grismer admittedly had knowledge of the bankrupt condition of these companies and after their quarrel with Keane. The conspirators' sale of promotion stock without disclosing their appropriation of corporate funds was an essential part of the conspiracy charge and the Government was entitled to prove it. This was certainly evidence of a continuing concert of action between Grismer and Allen.

The Court found no difficulty in overruling appellant's contention that the conspiracy ended in December, 1946. This point was raised by appellant at the conclusion of the Government's case and the Court said:

> "Aside from that, the motion it seems to me has no real merit for the reason that under the evidence the jury has a right to find that Mr. Allen and Mr. Grismer were conspirators, and certainly that conspiracy, if there existed one, didn't end in December, 1946. It might have become more active and ripened more . . . the jury would be entitled to find from this evidence as it now stands that Mr. Keane and Mr. Allen were the primary conspirators, that Mr. Grismer was the dupe of both until December, 1946, and thereafter he became the dupe of Mr. Allen, and that Mr. Allen while pretending to have no interest or connection with Mr. Keane, was actually associated with him in some sort of an unholy partnership as

> evidenced by the money that he got, which is very difficult to understand if he had no connection with the stock, so that I think you can make your motion as to certain exhibits, stating the time. I'm going to deny them on the basis of the date of December, 1946, being the end of any conspiracy and even if it were the end of any conspiracy the acts of Mr. Allen or the advantages he obtained with respect to the Pilot or the Extension or the Montana Leasing are of evidentiary worth to aid the jury in determining the truth." (R. 930, 931)

Following this suggestion of the Court that the acts of Mr. Allen or the advantages he obtained after December, 1946 were of evidentiary worth, let us assume for the purposes of argument that the conspiracy terminated as appellant contends on December 26, 1946. There would still be no reason to exclude any of the evidence which appellant argues should not have been admitted. Plaintiff's Exhibit 48, mentioned specifically in appellant's brief (p. 73), are E. J. Gibson & Co. checks made payable to "Cash" and "B. A. McLean" (French) in payment of Extension stock which was transferred from Certificate 14, which was the promotion stock issued in the name of Grismer (Ex. 116). The proceeds from these checks went to Allen (Allen R. 1134; French R. 344-349). Evidence of Allen's disposition of any of the promotion stock at any time regardless of when the conspiracy terminated was certainly material on the question of Allen's participation as a promoter and of his disposition of stock after draining all of the money from the corporations. Under any other theory the Government would be foreclosed from proving that a defendant became co-owner of promotion stock if he were clever enough to wait until after a disagreement with his co-conspirators before disposing of his share of the promotion

stock and realizing that additional portion of the fruits of his fraud.

Although no further evidence is directly specified in appellant's brief as having to do with transactions after December 26, 1946, we will discuss certain exhibits containing documents of a later date. Exhibits 6 and 7, the Extension cancelled checks and bank statements, were introduced in evidence to show the complete disposition of the corporate funds which were fraudulently obtained from the public as the result of the conspiracy. In effect, appellant introduced the same evidence in the form of Randall's audit of Extension covering a period ending June 30, 1947 (Ex. T). As a matter of fact, only three items in the Extension account came after December 26, 1946; a salary check to Glynn Evans on January 2, 1947, a small check to Western Union on January 31, 1947 and a check for $246.07 on March 13, 1947 to close out the Extension account. It is submitted that these exhibits were clearly admissible regardless of the date of the termination of the conspiracy.

The same situation prevails as to Exhibits 14, 15, 16 and 17, the Pilot deposit slips, checks, bank stubs and bank statements. Appellant put in evidence Pilot's financial picture up to June 30, 1947 through Randall's audit of Pilot (Ex. U). After December 26, 1946 only six relatively small Pilot checks were written. Five of these were written in January, 1947, one to Keane, one to Vermillion, two to Internal Revenue and one to the Idaho Unemployment Compensation Division. The last check was written on February 18, 1947 to Higgins Machine Works. Deposits of approximately $1,000.00 in January and February, 1947 covered these few checks. In any event the inclusion of this tag-end of

documentary evidence showing the effect on these corporations of the illegal diversions was in no way prejudical to appellant. Analysis of the other exhibits containing documentary evidence dated 1947 (Exs. 97, 98, 99, 100 and 101) will show that they were all records necessary to support Denney's summaries showing the disposition of promotion stock by Allen through Standard Securities Corporation, a Spokane broker, or its proprietor, Paul Sandberg. In order to trace the promotion stock by certificate numbers this broker's "in-and-out records" for Extension (Ex. 97) and Pilot (Ex. 100) had to be examined. Part of the stock was disposed of through the brokerage company so that the Standard Securities Company checks (Ex. 98) and Allen's account with this broker (Ex. 99) were essential and these transactions are reflected in Denney's summaries (Exs. 116 and 117). A small portion of the stock was disposed of through Paul Sandberg personally so that the personal checks which he had given to Allen (Ex. 101) were introduced in evidence as the slips attached to these checks referred to the certificates which Sandberg received from Allen. All of these exhibits show that Allen disposed of promotion stock through Sandberg and Standard Securities Company. The number of shares disposed of and source of the stock are disclosed in the summaries (Exs. 116 and 117).

It is submitted that regardless of the date of the termination of the conspiracy all of this documentary evidence was clearly admissable as direct evidence against Allen, to show his participation as a promoter of Extension and Pilot and his continued sale of the promotion stock after he had participated in the diversion of the funds of these companies. The exact date

of the conspiracy's termination might be important if any of the evidence introduced involved admissions made to a third party by one of the conspirators since such are admissible against a co-conspirator only if made during the course of the conspiracy. It is submitted that there was no such evidence presented in this case and the exact date of the conspiracy's termination is of no importance.

As the Court pointed out,

> "What happened after 1946 can be of great assistance to the jury in knowing what the relationship was before 1946, in December, so that what Mr. Allen did as to stock after December, 1946, that had originally come to Keane before December, 1946, is very pointed in the inference it allows as to the truthfulness of what Mr. Keane is saying and as to the falsity of the inferences on cross-examination." (R. 929)

III. *As to Grismer's Participation (Appellant's Point III)*

It is difficult to see how appellant's argument as to Grismer's innocence is of any material assistance to appellant or any reason for reversing the jury's verdict as to appellant. However, the best answer to appellant's argument that Grismer was not a conspirator is to point out that Grismer entered a plea of nolo contendere to the conspiracy count after conferring with his counsel. Consequently it was not necessary for the Government to submit all of its evidence proving that Grismer was a conspirator. There would be no purpose of a plea of nolo contendere or guilty if a defendant had to be proven guilty after his admission of guilt as a conspirator. In addition the testimony of Grismer shows that he participated in the organizing of these companies, agreed to serve as a president

and manager, respectively, signed false financial statements as president and failed in his duty to disclose the true financial affairs of these companies.[1] He permitted his name to be used as a front and turned over his promotion stock to Keane and Allen so that it could be sold even after the corporate funds were all dissipated.

As Judge Black stated in denying appellant's motion for a judgment of acquittal at the conclusion of the Government's case,

> "There is much in the evidence that would indicate that Mr. Keane and Mr. Allen were the conspirators and that Mr. Grismer was a dupe. However, a dupe can be a conspirator. Usually a dupe who is a conspirator gets little of the proceeds, and under the evidence the jury would have the right to believe that Mr. Allen and Mr. Keane together took advantage of Mr. Grismer as a dupe until December, 1946, at which time Mr. Allen monopolized the advantages of Mr. Grismer." (R. 930)

Counsel cites no authority nor is it believed that any can be cited to the effect that appellant has any right to challenge the guilt of any defendant who with the advice of competent counsel has entered a plea to a count in the indictment. Counsel for appellant Grismer has not joined with the appellant Allen in Allen's contention that Grismer is not guilty of conspiracy. In any event it is difficult to say how this argument has any bearing on Allen's guilt or innocence.

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[1] See statement filed May 7, 1946 with Department of Licenses for State of Washington contained in Ex. A.

IV. *As to Giving of Erroneous Instructions and Supplemental Instructions (Appellant's Point IV)*

Argument is made by appellant Allen that the court committed error in instructing that the testimony of Keane and Grismer was not necessary in the case against Allen, provided the jury was convinced beyond all reasonable doubt of his guilt from the other testimony in the case. Because appellant omits any reference to the court's prefacing statements, which are essential to an understanding of his purpose in so instructing the jury, and which precludes any inference or suggestion on the part of the court as to Allen's guilt if Keane's testimony is eliminated, we include them here in full:

> "If you should find that any witness or witnesses have intentionally testified falsely as to any material matter in the trial, and if you have because of that decided to disregard the entire testimony of such witness or witnesses except as such has been corroborated, as I've stated to you, then you should determine whether or not the remaining evidence establishes the guilt of the defendant Allen beyond all reasonable doubt as to the seven counts or any of them. In the event it does so establish his guilt beyond all reasonable doubt as to the seven counts or some of them, then it will be your duty to return a verdict of guilty in accordance therewith regardless of the fact that you may have disregarded the testimony of one or more witnesses for what you find to have been willfully false testimony. I'm not suggesting by this that I do or do not believe that the defendant Keane or the defendant Grismer or the defendant Allen or any other witness has willfully, knowingly or intentionally testified falsely as to any material matter. The determination of whe-

ther any witness or witnesses, including the defendant Allen, testified truthfully or otherwise is your responsibility.

"In this case if you are convinced by such evidence as you consider worthy of belief, including the facts and circumstances which you find from the evidence existed, that the defendant Allen is guilty beyond all reasonable doubt as charged in one or more of the counts, it will be your duty to so find, regardless of how much or how little credence you may give to the testimony of the defendants Keane and Grismer or either of them.

"In such connection, had the defendants Keane and Grismer or either of them come to trial before you in this case upon pleas of not guilty as to each and every count, along with the defendant Allen, and had either or both of the defendants Keane and Grismer declined, as they would have had the right to decline, to take the stand, so that there would have been no evidence from them or either of them, it would still have been your duty to have found each of the defendants including the defendant Allen guilty providing you were so convinced beyond all reasonable doubt from the evidence before you without the testimony of Keane or Grismer or without the testimony of such one as did not testify. That is, you are instructed that the testimony of neither Keane or Grismer is necessary to the government's case against the defendant Allen providing you are convinced beyond all reasonable doubt of the guilt of the defendant Allen from the other testimony, including the exhibits, facts and circumstances proved in the case to your satisfaction beyond all reasonable doubt. However, if you should disregard the testimony of any witness or witnesses, whether or not it be that of Keane and Grismer or either of them, and are not convinced beyond all reasonable doubt by the remaining testimony of the guilt of the defendant Allen as to any count or counts, then you should acquit the defendant Allen as to such

count or counts concerning which you find a lack of testimony." (R. 1228-1230)

We submit that these statements of the court could hardly be said to be described by appellant where he said:

> "The court's instruction that the testimony of Keane and Grismer was not necessary to convict Allen was erroneous, of material prejudice to defendant Allen, and requires a reversal." (App. Brief 87)

It has always been the prerogative of the Federal courts to comment upon the evidence. Remarks of Judge Black which are the subject of appellant's objection, however, hardly seem properly described as a comment on the evidence, but are instead purely a correct statement of the law for the guidance of the jury. We submit that under the circumstances of this case the court properly instructed the jury in this connection, and the instruction when taken as a whole was more than sufficient to avoid being misconstrued as carrying any suggestion of the court's impressions to the jury.

In this case, as has already been pointed out, there was abundant and overwhelming direct evidence against the appellant Allen, without the testimony of Keane and Grismer. The Government's case against Allen was not dependent upon their testimony nor upon circumstantial evidence; there was the testimony of numerous independent witnesses to the fact of Allen's participation in the conspiracy (supra, p. 24).

We submit that the jury was not precluded from finding Allen guilty on the testimony of independent witnesses merely because his accomplices Keane and Grismer testified after entry of their pleas of nolo contendere.

Most of the argument developed by appellant against the use of Keane and his evidence by the Government was argued at length to the jury, and is one that should not be made over again to this court, since the trial court properly and adequately cautioned the jury as to Keane's being an accomplice and also gave the necessary cautionary instructions with regard to the manner and extent to which his testimony should be credited (R. 1215-1216).

Appellant's discussion of accomplices as witnesses, based on cases most of which are over 100 years old, does not express the modern law as to the use of accomplices' testimony. The rule as to accomplices' testimony which exists in Federal courts was correctly stated by Judge Black in this case (R. 1215-1216). The testimony of an accomplice is required to be subjected to close scrutiny and examination, and weighed with great care and caution; it can be attacked before the jury as being unworthy of belief and prompted by unworthy motives (as it was in this case); but, nevertheless, a conviction for conspiracy can rest upon the uncorroborated testimony of an accomplice. *United States v. Glasser*, 116 F. (2d) 690 at 703. (Reversed on other grounds, *Glasser v. U. S.*, 315 U. S. 60;) *Westinrider v. U. S.*, 134 F. (2d) 772, (C. C. A. 9); *Caminetti v. U. S.*, 242 U. S. 470, at 495.

The modern law that a conviction can rest upon the uncorroborated testimony of a single accomplice was recently reaffirmed by this court in the case of *Catrino v. U. S.*, 176 F. (2d) 884. In the Allen case, there was the *corroborated* testimony of *two accomplices,* plus the independent testimony of more than a dozen witnesses.

There is the implication in appellant's brief that

the United States Attorney and his assistant entered into some sort of conspiracy with Judge Driver to accept a plea of nolo contendere from Keane and to give him a suspended sentence in exchange for his testimony (App. Brief pp. 84, 86). Without wasting the court's time in answer to such an argument, it can be said that the Government made no recommendation to the court as to the acceptance of a plea of nolo contendere and made no recommendation as to the sentence to be imposed upon the defendants. Under the system used in this District, that is the function of the court with the advice of the probation officer, which fact counsel for appellant well knew.

Appellant contends (App. Brief pp. 88-91) that the court erred in giving the jury additional instructions after they had deliberated for one evening and one full day. This court has passed upon this question in the case of *Charlton v. Kelly*, 156 F. 433, in deciding that the trial court has wide discretion in the matter of charging the jury, and may bring the jury in at any time and give them additional instructions, whether requested or not. Where the jury asks for additional instructions on a particular question, as they did in this case, it is clearly within the court's discretion, and not error, for the court to at the same time further instruct them on any issues. Also, in the case of *Allis v. U. S.*, 155 U. S. 117, at page 123, the court held:

> "It is a familiar practice to recall a jury after they have been in deliberation for any length of time for the purpose of ascertaining what difficulties they have in the consideration of the case, and of making proper efforts to assist them in the solution of those difficulties. It would be startling to have such action held to be error, and error sufficient to reverse a judgment. The time at

> which such a recall shall be made, if at all, must be left to the sound discretion of the trial court, and there is nothing in the record to show that the court, in the case at the bar, abused this discretion or failed to wait a reasonable time for the consideration of the case by the jury under the charge as already given."

Under the circumstances of this case, it was not error but the court's duty to give all instructions he believed necessary to answer the questions which troubled the jury. The foreman of the jury propounded the question as to whether or not Count I included the other counts. However, another juror spoke up and said that in starting to analyze Count I and subsequent counts that repetition and the duplicity of charges was confusing, and asked the court for help on behalf of the jury (R. 1264-5). The court thereupon, within its discretion, proceeded to aid and assist the jury in analyzing the counts and the elements thereof. The court prefaced his instructions as follows:

> "I assume that there are two problems troubling you. One is whether or not the defendant is not charged seven times with the same offense, and the other is whether or not it is necessary for the government to establish in connection with each count each and every allegation of the first paragraph of the first count." (R. 1269)

In concluding, the court very cautiously stated to the jury:

> "I'll let you know now that all of the instructions that I gave you yesterday are in full force and effect, including the presumption of innocence, reasonable doubt, its definition, and all of the other things that I told you yesterday. You may now retire." (R. 1277)

It is submitted that the trial court's additional instructions were not complex, conflicting, contradictory and misleading, but were clear, cogent, concise and proper as to the law in the case, and it would have been improper for the court not to have assisted and helped the jury in its apparent quandry.

V. As to Inconsistency in Verdict (Appellant's Point V)

It is respectfully pointed out that the acquittal on the substantive counts and the conviciton on the conspiracy count are not inconsistent. Conspiracy is the combining, confederating and agreeing to do a criminal act or acts, but it does not involve accomplishing the completed act. The substantive counts involve a completed fraud, whereas the conspiracy count is merely an agreement to swindle or defraud. Persons could very well conspire to do something and fail to accomplish it. In this case the jury might very well have believed that Allen combined, confederated and agreed with Keane and Grismer to embezzle and misappropriate moneys of the Pilot and Extension, but that he actually did not go so far as to commit the substantive offenses charged because of some intervening reason. The jury may not have been satisfied as to Allen's connection with the jurisdictional mailings set forth in the substantive counts or may have disagreed as to when Allen entered the conspiracy with relation to the dates of such mailings. Any number of consistent hypotheses can be imagined. However, as this court stated in the recent case of *Langford v. U. S.*, 178 F. (2d) 48 (Jan. 1950):

> "We do not think the acquittal on the first count is inconsistent with conviction on the second count, but even if it were, consistency in the ver-

dict is not required." (Citing the case of *Dunn v. U. S.*, 284 U. S. 390, and another of its recent cases so holding, *Catrino v. U. S.*, 176 F. (2d) 884 (1949).)

Also see: *Robinson v. U. S.* (C. A. 9, 1949) 175 F. (2d) 4.

It is useless to waste time discussing old cases. Since verdicts do not need to be consistent, each separate count of an indictment is now treated as a separate indictment, and an acquittal on one or more counts is no reason a conviction can not be had on one or more other counts.

In the case of *Troutman v. U. S.* (CCA 10) 100 F. (2d) 628, where the indictment, as here, charged violations of the Securities Act, the Mail Fraud Statute and the Conspiracy Statute, a judgment of conviction against one of the defendants found guilty only on the conspiracy count was upheld.

VI. As to Use of Conspiracy Charge for Procedural Advantage (Appellant's Point VI)

Counsel's argument is to the effect that Congress should repeal the conspiracy statute and not leave it as a weapon to prosecutors and law enforcement agencies. Of course the conspiracy statute has been used with the approval of the Federal courts many times. When the new Judicial Code was compiled by Congress and took effect in 1948, the conspiracy statute, instead of being eliminated, had an increased punishment, the punishment being raised from two to five years, so that Congress did have an opportunity to consider whether or not the conspiracy statute should be continued in the criminal code and decided upon giving it a position of increased importance rather than repealing it. (Title 18, U. S. C., Sec. 371)

No unfair procedural advantages were taken of the appellant. Since both of appellant's co-conspirators testified, the problem of using co-conspirators' statements made to third parties during the conspiracy as evidence against Allen does not appear in this case. His case was submitted to the jury under a fair set of instructions and the essential elements of the conspiracy outlined carefully by the Judge to the jury. We are in accord with all the cases cited by appellant under this assignment of errors which hold that the Government should use caution and care, but the evidence in this case clearly shows, as summarized by the trial judge, that Allen was a leading participant or a principal (R. 927-934). It is submitted that the evidence clearly shows conspiracy on the part of the appellant Allen and his acquittal would have been a miscarriage of justice.

Many assignments of error in this case have not been argued at all in appellant's brief, as required by the provisions of Rule 20 (f) of the rules of this court. This court has held that where no argument has been made in the brief on certain rulings on the evidence which are assigned as error, as required by the court rule, the Court of Appeals is not required to consider such ruling. *Martin v. Sheely,* (C. C. A. 9), 144 F. (2d) 754. Although in criminal cases the rule is that this court can notice plain error whether assigned or not, it is submitted that none of appellant's unargued assignments of error attain this importance.

CONCLUSION

It is respectfully submitted that the evidence in this case properly demonstrated that the appellant Allen did enter into a conspiracy with others to misappropriate, divert and embezzle funds of the Extension Mining Company and the Pilot Mining Company and that the appellant did receive a fair trial before an impartial judge and jury; that the Court's instructions were proper and sufficient; that no errors which were prejudicial to the appellant occurred during the trial; that the verdict of the jury, rulings, judgment and sentence of the Court were proper in all respects.

Respectfully submitted,

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